

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID T. PINEGAR)	
Claimant)	
VS.)	
)	
JACK COOPER TRANSPORT)	Docket No. 1,059,928
Respondent)	
AND)	
)	
CONTINENTAL NATIONAL INDEMNITY COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the October 23, 2013, Award entered by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on February 11, 2014.

APPEARANCES

Michael R. Wallace of Shawnee Mission, Kansas, appeared for claimant. Michelle Daum Haskins of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated that the only issues are: (1) the nature and extent of claimant's disability; (2) is K.S.A. 2011 Supp. 44-510h constitutional; and (3) did claimant overcome the presumption created by K.S.A. 2011 Supp. 44-510h(e) that he will not need additional medical treatment after reaching maximum medical improvement? Claimant acknowledged the Board lacks authority to determine if K.S.A. 2011 Supp. 44-510h is constitutional, but raises this as an issue for a potential appeal to the Kansas Court of Appeals.

ISSUES

ALJ Belden awarded claimant disability benefits for a 10% whole body functional impairment. He determined claimant did not prove his entitlement to an award of future

medical benefits. The ALJ found the issue of the constitutionality of K.S.A. 2011 Supp. 44-510h raised by claimant is reserved for determination by a court of competent jurisdiction, as the ALJ did not have authority to rule on constitutional issues.

Claimant requests the Board award him benefits for a 17% whole body functional impairment and future medical benefits. Claimant recognizes the issue of the constitutionality of K.S.A. 2011 Supp. 44-510h cannot be resolved at the administrative level and preserves that issue for appeal.

Respondent requests the Board affirm the Award. Respondent notes in its brief that the Board does not have jurisdiction to decide constitutional issues.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's disability?
2. Does the Board have the authority to consider whether K.S.A. 2011 Supp. 44-510h is constitutional?
3. Did claimant overcome the presumption created by K.S.A. 2011 Supp. 44-510h(e) by presenting medical evidence that it is more probably true than not he will need additional medical treatment after reaching maximum medical improvement?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

A complete description of claimant's accident is contained in the Award and need not be repeated here. Moreover, respondent stipulated claimant met with personal injury by accident on January 17, 2012, arising out of and in the course of his employment.

At the July 30, 2013, regular hearing, claimant indicated he was still experiencing low back pain and occasional burning in his left buttock. Claimant indicated weather increases his low back pain, but did not specify what type of weather caused the increase in pain. He also indicated he had a decrease in his range of motion and had difficulty putting on his socks and shoes in the morning because of stiffness. Claimant also noted a loss of strength.

Claimant acknowledged that in 2006, he saw Dr. Nab, a chiropractor, for back problems. Over the past five to six years, he saw Dr. Nab five times.

On May 10, 2012, Dr. Glenn M. Amundson performed surgery on claimant – an L5-S1 discectomy on the left to decompress a left S1 nerve root. Dr. Amundson testified

the surgery went well. The doctor's notes from claimant's last visit on November 1, 2012, indicated claimant was doing well and claimed 0 on a 0-10-scale level of pain. The doctor's notes from that visit indicated claimant's radiculopathy had completely resolved and claimant felt he could return to work in an unrestricted status.

Dr. Amundson testified claimant "was a DRE Impairment Category 3, which is described as radiculopathy and is assigned a 10 percent whole person impairment."¹ The doctor testified he utilized the *Guides*² to arrive at his functional impairment rating.

Dr. Amundson was asked if claimant needed treatment for the symptoms he described at the regular hearing:

Q. Okay. If he had those type of symptoms [mechanical low back pain, burning in his left buttock, difficulty in the morning putting on his socks and shoes secondary to stiffness and occasionally took over-the-counter medications to help with pain] and came back to see you, is that a time that you would, say, decide whether or not you would treat it or perhaps refer him out for pain management?

A. Well, I would hope, frankly, that possibly he'd get to a work comp physician who would prescribe nonsteroidals --

Q. Okay.

A. -- and identify it for what it probably is, as some overuse.

Q. So if he were having those type of symptoms -- or complained of those type of symptoms, you would want him to seek medical attention to determine what was wrong?

A. Again, he's a patient -- whatever he needs.³

. . .

Q. Doctor, now that you've heard some of what Mr. Pinegar testified to, does it give you any reason to be concerned he should come back to see you?

A. I don't think I'd have anything to offer him.

Q. Okay.

¹ Amundson Depo. at 6.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Amundson Depo. at 11.

A. I mean, I'd always be more than happy to see him and do anything I could. But it sounds like nonsteroidal anti-inflammatories, some heat and ice is all he needs at the present time. And I --

Q. And those are -- go ahead. I'm sorry.

A. And I would expect it to get better and better with time, not worse.⁴

Dr. Amundson's medical records do not indicate he was aware claimant, prior to his work injury, received chiropractic treatment for his back from Dr. Nab. Nor was Dr. Amundson asked if he was aware claimant received chiropractic treatment by Dr. Nab. Dr. Amundson was not asked, nor did he opine, if claimant had a preexisting low back impairment.

At the request of his attorney, claimant was evaluated by Dr. Daniel D. Zimmerman on December 17, 2012. Dr. Zimmerman took a history from claimant, conducted a physical examination and reviewed claimant's medical and chiropractic records. An x-ray of claimant's back taken at Dr. Zimmerman's request demonstrated disc space narrowing at L5-S1. According to Dr. Zimmerman, claimant reported having continued pain and discomfort affecting the lumbar spine and lumbar paraspinous musculature, restricted range of motion at the lumbar level, and radicular bilateral lower extremity weakness.

Dr. Zimmerman, using Table 75 of the *Guides*, assigned claimant a 10% whole body functional impairment for the operative procedure. Using Tables 81 and 82 of the *Guides* for range of motion restrictions, Dr. Zimmerman opined claimant had a 3% whole body functional impairment for extension and a 1% whole body functional impairment for lateral flexion. The doctor opined claimant had radicular weakness in both lower extremities. Using Tables 21 and 83 of the *Guides*, Dr. Zimmerman opined claimant had a 7.4% functional impairment to each lower extremity, which using the conversion formula converts to a 3% whole body functional impairment. The doctor testified applying the Combined Values Chart in the *Guides* results in a 19% whole body functional impairment.

Dr. Zimmerman opined that it was more probably true than not claimant will require additional medical treatment provided or prescribed by a licensed physician in the future. The doctor testified:

Well, you would do it in kind of an algorithm thought process. If he begins to have symptoms that can't be controlled self directed then he should be treated with a nonsteroidal anti-inflammatory medication in a therapeutic dosing schedule and have appropriate monitoring for the use of such a medication, in that there are deleterious side effects that can occur.

⁴ *Id.* at 12.

If that isn't totally successful physical therapy is the next step, either self directed physical therapy or a formal physical therapy program to learn what he needs to do for his own self-management. Pain management procedures could be indicated, if his symptoms require, and if he develops radicular symptoms in the future he may require further diagnostic studies and potentially further operative management.⁵

Dr. Zimmerman's report did not indicate, nor did the doctor testify, he was aware claimant received chiropractic treatment from Dr. Nab for a preexisting back condition. Dr. Zimmerman was not asked, nor did he opine, whether claimant had a preexisting low back impairment.

By order of the ALJ, claimant underwent an independent medical evaluation by Dr. Terrence Pratt on April 12, 2013. The ALJ's Order directed Dr. Pratt to rate each of claimant's body parts in accordance with the *Guides*. Dr. Pratt issued an IME report, but did not testify. The doctor indicated claimant was between DRE Lumbosacral Category III and IV of the *Guides* and he used the range of motion model to help differentiate. The doctor assigned claimant a 10% whole body functional impairment for the operative intervention and a 5% whole body functional impairment for loss of range of motion, for a 15% whole body functional impairment.

The ALJ's Order appointing Dr. Pratt to evaluate claimant requested Dr. Pratt rate claimant's body parts in accordance with the *Guides*. The Order did not specifically ask the doctor to determine if claimant had a preexisting impairment and, if so, rate the preexisting impairment. However, Dr. Pratt, after evaluating claimant, determined he had a preexisting 5% whole body functional impairment and his 2012 accident resulted in a 10% whole body functional impairment. The doctor based his opinion that claimant had a 5% preexisting functional impairment on claimant's prior back symptoms, chiropractic treatment, and reports of degenerative changes. With respect to claimant's prior chiropractic treatment, Dr. Pratt noted:

9. Advanced Chiropractic documentation is available from January 30, 2012 until March 9, 2012. He reported frequent sharp shooting, tightness discomfort. He reported a history of low back pain that started two years ago. Previous treatment included manipulation of the low back and hips. It did get better after adjustments and he has not had problems with it until the most recent aggravation with symptoms beginning in December 2011. He could not state a specific incident that caused his pain but felt that his job was a contributing factor. He was felt to have a lumbar disc injury. Chiropractic care was documented. The last report noted symptoms had worsened since the last visit and he had an appointment scheduled with a surgeon. He had already had two injections.⁶

⁵ Zimmerman Depo. at 22-23.

⁶ Pratt IME Report at 3.

Dr. Pratt indicated claimant was at maximum medical improvement and at the time of the doctor's report did not need active medical treatment. The doctor stated claimant should continue with his home therapeutic program with stretching and use over-the-counter medications as necessary for his mild residual symptoms.

PRINCIPLES OF LAW AND ANALYSIS

Nature and Extent of Claimant's Disability

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁸

K.S.A. 2011 Supp. 44-501(e) states:

An award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

The Kansas Court of Appeals in *Hanson*⁹ addressed the predecessor to the foregoing statute and noted it is respondent's duty to prove preexisting impairment.

K.S.A. 2011 Supp. 44-508(u) states:

"Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

Drs. Amundson and Zimmerman were not asked, nor did they assign, a functional impairment for claimant's preexisting back condition. Dr. Amundson assigned claimant a 10% whole body functional impairment for being in DRE Lumbosacral Category III.

⁷ K.S.A. 2011 Supp. 44-501b(c).

⁸ K.S.A. 2011 Supp. 44-508(h).

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

Dr. Zimmerman gave claimant a 19% whole body functional impairment for his operative procedure, range of motion loss and radicular weakness.

Dr. Pratt was not asked to provide a functional impairment rating for claimant's preexisting condition. Nevertheless, Dr. Pratt opined claimant had a 15% impairment rating with 5% attributed to claimant's preexisting back condition and 10% attributed to his work injury. The 5% whole body functional impairment for claimant's preexisting back condition was based upon 2012 chiropractic records of Advanced Chiropractic that indicated claimant had reported a history of low back pain starting two years earlier, and reports of degenerative changes.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. Factors to consider include the level of claimant's pain immediately before the recent injury, whether claimant received additional treatment and the nature of his activities in the intervening years in order to determine the preexisting impairment.¹⁰ Those factors must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*. Claimant testified he saw his chiropractor, Dr. Nab, five times over the five to six years prior to the regular hearing. There is nothing in the record indicating that as a result of claimant's preexisting back condition he missed work, was assigned restrictions, self-limited his activities or was partially disabled.

The Board finds Dr. Pratt's 15% whole body functional impairment is appropriate, but finds there is insufficient evidence to establish claimant had a 5% preexisting whole body functional impairment. Claimant received limited chiropractic treatment for his back condition prior to his work injury at respondent and was not disabled. In support of his opinion that claimant had a 5% preexisting functional impairment, Dr. Pratt did not indicate claimant underwent any diagnostic tests prior to his work injury that show claimant had a preexisting degenerative change.

Drs. Amundson and Zimmerman indicated claimant had radiculopathy. Dr. Amundson indicated claimant was in DRE Lumbosacral Category III, while Dr. Pratt thought claimant was somewhere between DRE Lumbosacral Category III and IV. All three physicians believed claimant had at least a 10% whole body functional impairment. Accordingly, the Board gives equal weight to the whole body functional impairment ratings of Drs. Amundson, Zimmerman and Pratt and averages their functional impairment ratings. Therefore, the Board finds claimant has a 14.67% whole body functional impairment.

¹⁰ *Gibson v. Beachner Construction Co., Inc.*, No. 1,040,920, 2010 WL 1445612 (Kan. WCAB March 11, 2010).

Constitutionality of K.S.A. 2011 Supp. 44-510h

Claimant stipulated the Board has no authority to determine if K.S.A. 2011 Supp. 44-510h is constitutional. The Board adopts the findings of the ALJ on this issue. The Board is not a court of proper jurisdiction to decide the constitutionality of laws in the state of Kansas, as it was not established by Article III of the Kansas Constitution. A statute is presumed constitutional.¹¹ The Board shall apply K.S.A. 2011 Supp. 44-510h as written until instructed otherwise by a court of competent jurisdiction.

Claimant's Entitlement to Future Medical Benefits

K.S.A. 2011 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The Board finds there is sufficient medical evidence that it is more probably true than not claimant will need additional medical treatment beyond over-the-counter medications and a home exercise program even though he has reached maximum medical improvement.

Dr. Pratt, the court-appointed IME doctor, indicated claimant "does not require active medical care at this time. He should continue with the home therapeutic program with his stretching activities. He can utilize over-the-counter medications for his mild residual symptoms as necessary."¹² The Board finds that in making the foregoing statement, Dr. Pratt spoke only to claimant's current need for medical treatment. While the ALJ's Order appointing Dr. Pratt asks him to give an opinion on future medical treatment, Dr. Pratt

¹¹ *Baker v. List and Clark Construction Co.*, 222 Kan. 127, 563 P.2d 431 (1977).

¹² Pratt IME Report at 3-4.

did not specifically state claimant would not need future medical treatment beyond over-the-counter medications and a home exercise program.

Even if the Board's interpretation of Dr. Pratt's statement concerning claimant's need for medical treatment is in error, there is ample medical evidence that claimant will need future medical treatment. Dr. Zimmerman testified that more probably than not claimant would require future intervention by a physician. The Award calls this opinion speculation. The Board will note that whether a claimant will need additional medical treatment after reaching maximum medical improvement is often speculative. It is equally speculative claimant will not need future medical treatment beyond over-the-counter medications and a home exercise program.

The Board also disagrees with the Award's finding that Dr. Amundson did not believe claimant's current symptoms evidenced a need for future medical treatment, but represented residual symptoms from his injury that were expected to improve over time. Dr. Amundson indicated that if claimant had symptoms he testified to at the regular hearing, Dr. Amundson hoped claimant would get to a workers compensation physician who could prescribe a non-steroidal anti-inflammatory medication.

CONCLUSION

1. Claimant has a 14.67% whole body functional impairment.
2. The Board has no authority to consider the constitutionality of K.S.A. 2011 Supp. 44-510h.
3. Claimant met his burden of proving with medical evidence it is more probably true than not that he will need additional medical treatment beyond over-the-counter medication and a home exercise program.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the October 23, 2013, Award entered by ALJ Belden as follows:

¹³ K.S.A. 2013 Supp. 44-555c(j).

David T. Pinegar is granted compensation from Jack Cooper Transport and its insurance carrier for a January 17, 2012, accident and resulting disability. Based upon an average weekly wage of \$1,345.13, Mr. Pinegar is entitled to receive 37.86 weeks of temporary total disability benefits at \$555 per week, or \$21,010.74, followed by 57.53 weeks of permanent partial disability benefits at \$555 per week, or \$31,929.15, for a 14.67% whole body functional impairment, making a total award of \$52,939.89, which is all due and owing less any amounts previously paid.

Claimant is entitled to apply for future medical treatment.

All other findings and orders contained in the Award that are not inconsistent with the above are affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
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Honorable William G. Belden, Administrative Law Judge